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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 586

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IRVING GREENBERG, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 8, 1951.

OPINION BELOW.

The opinion of the court of appeals (R. 232-239) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on February 8, 1951 (R. 239). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED.

1. Whether a witness can properly be convicted of refusing to answer questions the answers to which he claims would tend to incriminate him, where he subpoenas the prosecutor's files and seeks to examine the minutes of the Grand Jury to show that his answers would in fact incriminate him, but he is not permitted to obtain the records so subpoenaed and sought to be examined.

2. Whether, where the record shows a general finding of guilty on all charges, but the formal judgment and commitment varies that finding in numerous material respects, a court of appeals may dispose of the appeal on the basis of the later formal judgment and commitment instead of on the basis of the actual proceedings at the trial.

3. Whether it is proper to try a defendant in a criminal case on one theory, for commission of one offense, and then to affirm his conviction on the theory that he has committed a different offense.

4. Whether a defendant may be convicted of disobedience of an order of a court where there is no showing in the record that he was ever given any specific order by the court.

5. Whether it is sufficient, in order to sustain a claim of privilege against answering questions alleged to be self-incriminating, to show that the witness in good faith fears, in the light of all the surrounding circumstances, that the answers to the questions asked would place him in a precarious position with reference to criminal prosecution.

CONSTITUTIONAL PROVISION AND STATUTES AND REGULATIONS INVOLVED.

The constitutional and statutory provisions and regulations involved are set forth below in the Appendix, *infra*, pp. 23-26.

STATEMENT.

On September 14, 1950, the Grand Jury of the United States for the Eastern District of Pennsylvania undertook an inquiry involving, *inter alia*, violations of the internal revenue and other criminal laws of the United States, and conspiracy to commit those offenses (R. 2a). On October 2, petitioner was subpoenaed to appear as a witness before said Grand Jury, at which time he refused to answer certain questions propounded to him, on the ground that the answers thereto would tend to incriminate him (R. 2a).

Thereupon, on October 9, petitioner's refusal to answer specified questions, including a question as to whether he was in the numbers business, was brought to the attention of the district court by the special prosecutor, one Goldschein (R. 222-223). Extensive hearings then followed on petitioner's claim of privilege, on October 9, 17-20, 23, 30, and 31.[1]

The basic question to which the prosecutor sought an answer was whether petitioner was in the numbers business. Also sought to be answered were questions as to the identity of certain numbers writers at his place of business known to petitioner, and as to what business he used his telephone for, this after he had answered that he did not use it for

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[1] The proceedings appear in this record in the following order: *October 9:* R. 222-224; R. 71a-95a; R. 203a-204a; R. 95a-99a. *October 17:* R. 99a-102a. *October 18:* R. 102a-109a. *October 19:* R. 109a-112a. *October 20:* R. 112a-115a; R. 224-226; R. 115a-117a; R. 205a-208a; R. 117a-118a; R. 208a-210a; R. 226-228; R. 210a-211a; R. 118a-119a; R. 211a; R. 119a-120a; R. 228; R. 211a-218a; R. 120a-121a. *October 23:* R. 121a-143a; R. 228 (last line)-231; R. 143a-145a. *October 30:* R. 218a-221a; R. 145a-148a. *October 31:* R. 149a-156a.

any lawful business.[2] It was contended on petitioner's behalf that the questions propounded, though on their face innocent, or in any event not on their face criminating as to federal law, would none the less supply links in a chain of evidence showing the commission of federal offenses, particularly under provisions of the Internal Revenue Code (*infra*, pp. 23-25), which require the keeping of books and records and penalize the failure to withhold pay of employees subject to federal income tax and to make social security payments.

The district judge inclined to the view that the incriminating nature *vel non* of the questions propounded, in the light of these provisions, turned on whether or not there were employees in the numbers business (R. 119a, 211a-212a). Meanwhile, in order to show the incriminating nature of the questions at issue, petitioner's counsel subpoenaed the prosecutor Goldschein to bring with him all his records concerning petitioner (R. 99a-100a, 110a-111a), and sought to examine the Grand Jury minutes pertaining to petitioner (R. 148a).

On October 23, petitioner testified under oath on his own behalf; he admitted not having answered certain questions (R. 130a), and stated that he had refused to answer because of fear of incrimination and on the advice of counsel (R. 131a-132a). He was not cross-examined on his testimony. His counsel, Morton Witkin, Esq., then testified that, after discussing the matter with petitioner, it was his opinion that answers to the questions involved would be incriminating (R. 143a). Mr. Witkin was not cross-examined either (R. 229). Again the court emphasized the fact that petitioner had not admitted that he did not keep any books or records or that he had not withheld withholding taxes (R. 134a, 135a, 136a, 137a).

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[2] This was the substance of the questions around which the discussions in the district court revolved; the exact form of the unanswered questions which were later the subject of the presentment are set forth below, p. 7, *infra*.

On October 30, the proceeding resumed (R. 218a), apparently after petitioner, having appeared again before the Grand Jury and having admitted that he knew numbers writers, had refused to answer the question *Who?* (R. 3a-6a). The district judge then said (R. 219a),

> I don't see here where there is any direct tendency to incriminate him. It may involve numbers writers, but I won't bridge that gap. I am directing him to answer who they are. * * * the question just is, does he know them. He doesn't say that he is associated with them.

There is no showing whatever in the record that petitioner was in court on this occasion.

The colloquy between court and counsel continued (R. 219a-221a), and then the district judge said (R. 145a-146a):

> THE COURT: I am getting to that.
>
> These repeated refusals to answer concern itself with the basic question "Are you in the numbers business?" I think that the continued getting around it in various or different variations with respect to it, since counsel have chosen to make their stand, I think they ought to go up on the question "Are you in the numbers business?" I don't understand the Government's position. Is it that you think eventually you are going to get the answer, Mr. Goldschein?
>
> MR. GOLDSCHEIN: Yes.
>
> THE COURT: Don't you think we would be better off to get a ruling from the Circuit Court as to that main question rather than side issues? I don't mean by that in anywise to say that it isn't pertinent and necessary, but aren't we just getting around, if he refuses to answer that he is in the numbers business, you have the unlawful business specifically decided, and the Court will decide. *Why don't you go up on the main issue as to whether or not he is in the numbers business?* [Italics added.]

The judge further said (R. 146a), "I am going to rule here, that these questions have to be answered, * * *."

Thereupon petitioner's counsel again sought a ruling on his subpoena *duces tecum* seeking the prosecutor's papers (*supra*, p. 4), and on the latter's motion to quash that subpoena (R. 146a-149a); the district judge ruled that (R. 150a)—

> with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate.

And again (R. 151a, 152a)—

> Until you make some showing you will not see those records.
>
> * * * * * * * *
>
> The next one is "Irving Greenberg by his counsel again requests the Court to allow him the minutes of the Grand Jury to show the questions asked of Irving Greenberg would tend to incriminate him."
>
> I deny that motion.

Thereafter, on November 1, the Grand Jury made formal presentment (R. 157a) that petitioner had refused to answer particular questions. It was pointed out that petitioner's reasons for his refusal to answer did not appear in the presentment (R. 158a-165a), whereupon the district judge ruled that the presentment should be amended to include such answers as petitioner actually gave before the Grand Jury (R. 165a-169a). After a recess, the Grand Jury returned with an amended presentment (R. 170a, 2a-9a), which was further amended, on motion, to include petitioner's answers in full by incorporating the same by reference (R. 173a-180a). Two days later, on November 3, petitioner was tried on the presentment as thus amended.[3]

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[3] In the presentment as printed in the record (R. 2a-9a), these additional answers in full which were added at the direction of the court (R. 173a-179a) have not been included.

The presentment alleged petitioner's refusal to answer four questions, on the ground that the answers would tend to incriminate him: (1) *Are you in the numbers business now?* (R. 4a). (2) *Who?*, being the question asked after he had answered that he knew men around a specified address who were in the numbers business (R. 5a-6a). (3) *Do you use it for any other business?* and (4) *What business do you use it for?*, after he had answered that he did not use his telephone for any lawful business (R. 6a).[4]

The presentment then alleged that petitioner (a) by his refusal to answer the questions propounded to him had thwarted the Grand Jury's investigation and obstructed the administration of justice, and that (b) he had disobeyed the order of the court to answer before the Grand Jury the aforesaid questions (R. 8a).[5] The presentment prayed that the court invoke its punitive power against petitioner (R. 8a-9a)—

> to preserve the authority and vindicate the dignity of the Court in order to maintain the proper functioning of the Court and the Grand Jury, and that this Honorable Court exercise its authority so that its power to punish may serve as a deterrent to other recalcitrant witnesses,who may be inclined to obstruct the business of this Grand Jury.

At the trial, petitioner was brought to the bar of the court (R. 10a), and the four questions above set out were read to him (R. 10a-13a). In answer to a question by the

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[4] The district judge was persuaded by petitioner's counsel that only three questions remained unanswered (R. 13a-14a). But since the court of appeals assumed that there were two unanswered questions dealing with petitioner's telephone (R. 234, 236), and since the issues now presented are not thereby varied, we are accepting the court of appeals' assumption for purposes of this petition.

[5] As the court of appeals pointed out (R. 233), "Charge (a) involved a violation of clause (1) of Sec. 401 of title 18, United States Code, and charge (b) involved a violation of clause (3) of that section." The text of the statutory provisions is set out in the Appendix, *infra*, p. 23.

court, petitioner admitted that he had refused to answer those questions before the Grand Jury (R. 13a).[6] Thereupon the district judge said (R. 14a):

> Now, you say those are the questions you were asked in the Grand Jury room?
>
> The burden here shifts to the defendant. What is your wish here, gentlemen?

Whereupon petitioner's counsel elected to proceed with the trial.[7]

At the trial, petitioner directed the court's attention to the pertinent provisions of the Internal Revenue Code and the regulations thereunder pertaining to withholding taxes on employees and social security taxes (R. 15a-18a; *infra*, pp. 23-26), and adduced the testimony of a recognized tax expert (R. 19a) to show that, if petitioner during 1950 was engaged in an unlawful business or in the numbers business, and such business required employees, then petitioner would be obliged to file returns under the Internal Revenue laws (R. 19a-26a).

It was also shown that the numbers business involved employees and that petitioner had so testified before the Grand Jury in answer to questions asked by the prosecutor (R. 25a-26a).

After a representative of the Collector of Internal Revenue had refused because of departmental regulations to honor a subpoena requiring the production of petitioner's withholding tax returns (R. 30a-36a), and had been sustain-

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[6] No point is made here that requiring petitioner to answer the court's question obviously compelled him to testify against himself in a criminal case.

[7] This procedure followed that previously outlined by the district judge (R. 182a): "I am going to call him to the bar of the Court and I am going to ask him whether he refused to answer these questions before the Grand Jury and give him an opportunity to answer them now, and then I will give you an opportunity, if you so wish, to offer evidence to us or go forward, if you will, to show that these questions, he does have reasonable ground for the apprehension of danger."

ed by the court in such refusal (R. 35a, 36a)[8] petitioner testified that he did not file any withholding returns during 1950 (R. 37a).

Petitioner's counsel, Mr. Witkin, was permitted to incorporate by reference (R. 57a) his testimony at the preliminary hearings that "It is my honest, sincere and legal opinion that were Mr. Greenberg to answer the questions which were propounded to him that he would be incriminating himself" (R. 143a).

Petitioner then called as his next witness the prosecutor Goldschein, who was in charge of the Grand Jury investigation, to show, *inter alia*, that petitioner was being investigated by the Grand Jury (R. 49a) and that the prosecutor's file contained proof of petitioner's precise unlawful business (R. 49a). Petitioner's counsel offered to prove not only the foregoing, but also that other witnesses before the Grand Jury were asked questions regarding petitioner; that petitioner himself was under investigation; that it was part of the plan of the prosecution to show that petitioner was guilty of violating the internal revenue laws; and that upon petitioner's answering the questions now involved, he would forthwith be prosecuted (R. 48a-52a). Objection to this offer of proof was sustained (R. 53a). Petitioner then introduced newspaper clippings to document his contention (R. 132a, 176a) that his "fear and apprehension that I would tend to incriminate myself" was based in part on "that which I have read in the newspapers." These newspaper articles (Def. Ex. I, R. 56a, 196a-197a) quoted the Department of Justice spokesman as saying that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws," and, further, "Goldschein himself stressed the importance of 'conspiracy' which, the

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[8] "THE COURT: * * * Let Greenberg take the stand if he didn't file. I won't compel the Government to do that. If they don't want to do it, I certainly will not tell them to." (R. 35a.)

other spokesman said, might lead to tieups between police and politicians and underworld characters."

The district judge did not permit petitioner's counsel to examine the records and documents in the prosecutor's possession which they sought for the purpose of showing the incriminating nature of the unanswered questions (R. 53a-54a), nor did he examine them himself. He refused permission to examine the Grand Jury minutes (R. 53a-54a), and he reserved decision on the motion with respect to quashing the subpoena *duces tecum* (*supra*, pp. 4, 6) "until proper showing is made" (R. 53a).

After both sides had rested, the judge reserved decision on the case (R. 64a). When the proceedings were resumed, on November 8, petitioner was called to the bar of the Court, and the district judge said (R. 65a):

> I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't I am ready to impose sentence. Do you want to answer?

Petitioner's counsel said, "We take the same position we have taken before, may it please Your Honor." Thereafter, after listening to argument on the sentence (R. 65a-71a), the district judge sentenced petitioner to five months' imprisonment, and admitted him to bail pending appeal (R. 71a). An appeal was taken on the same day (R. 1a).

Two days later, on November 10, the district judge signed a formal judgment and commitment (R. 198a-201a), which differed in several material respects from the earlier oral finding of guilty. (1) The formal judgment omitted all mention of the first unanswered question set out in the presentment, viz., *Are you in the numbers business now?* (2) The formal judgment reflected a finding of guilty as to only one of the charges made in the presentment, viz., disobedience of an order of the court, and said nothing as to the other charge, viz., obstruction of justice. (3)

There was a variance between the recital in the formal judgment as to what happened on November 8, and the stenographic record of that day's proceedings.[9]

On appeal, the court below affirmed petitioner's conviction, on the view that there was no finding that petitioner's refusal to answer the first question was a contempt, that the district court had held him in contempt only for disobeying its order to answer the remaining questions, and that there was no finding that petitioner obstructed justice by refusing to answer questions before the Grand Jury (R. 232-239); the court therefore said (R. 234):

> Accordingly we do not have to consider whether the appellant, in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury. Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misbehavior.

REASONS FOR GRANTING THE WRIT.

The most shocking feature of the present case is that the United States has prosecuted and convicted petitioner while simultaneously denying him the ability to defend: It has successfully contended that he was guilty of contempt in refusing to answer questions, claimed by him to be self-incriminating, and yet was permitted to assert privilege when he sought to obtain records in its possession which would have substantiated his claim.

This issue, we believe, transcends in importance both the substantive question of the extent of the privilege against self-incrimination, as to which there is a sharp conflict between several courts of appeals, and looms larger also than the other major question herein, namely, that there is

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[9] Since this last point might conceivably be regarded as argumentative, the details are set forth below, pp. 13-14.

a complete absence of any proof in this record of any order, and, in consequence, of any disobedience of any order—and yet petitioner's conviction was affirmed on the view that he had disobeyed the direct order of a district judge.

However, even before we are in a position to discuss any of these questions, it will be necessary preliminarily to direct attention to the literally bizarre misreading of the present record by the court below.

1. As the court of appeals properly noted (R. 233), the presentment charged both a violation of 18 U. S. C. 401(1)—refusal to answer four questions before the Grand Jury—and of 18 U. S. C. 401(3), deliberate disobedience of an order of the district court to answer those same four questions. See R. 8a. After the trial, the judge made a general finding of guilty (R. 65a). Two days thereafter, he signed a formal judgment and commitment which varied that general finding, first, in that it found petitioner guilty only of refusing to answer the last three questions, omitting any finding as to the unanswered query, *Are you in the numbers business now?*; and second, in that it found petitioner guilty only of deliberate disobedience of the lawful order of the court, omitting any reference to petitioner's alleged obstruction of justice by failing to answer questions before the Grand Jury (R. 199a-201a). The court of appeals dealt with the case on the basis of the recitals in the November 10 judgment, not on the basis of the general finding of guilty made in open court two days earlier (R. 234).

This was clearly error, since it is well settled that it is the judgment pronounced in court, not the later formal commitment, which is controlling; to the extent that the latter varies from what is said in court, it is utterly void. *Hill* v. *United States*, 298 U. S. 460; *Watkins* v. *Merry*, 106 F. 2d 360 (C. C. A. 10).

Adherence to that unquestioned rule, which was obviously disregarded by the court below, would require the court of appeals to consider two crucial questions in the case which it expressly passed over, viz., (1) the alleged in-

criminatory character of the question *Are you in the numbers business now?* (R. 234), and (2) whether petitioner "in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury" (R. 234).

Accordingly, we suggest that it may be appropriate, in view of the principle of *Hill* v. *United States*, 298 U. S. 460, *supra*, to vacate the judgment below without further briefs or argument and to remand the case to the court of appeals for consideration of those questions. Compare *United States* v. *Balogh*, 157 F. 2d 939 (C. C. A. 2), judgment vacated, 329 U. S. 692 (No. 800, Oct. T. 1946).

2. Even on the basis on which the court of appeals affirmed the conviction, viz., that petitioner disobeyed an order of the district court, there is still another threshold question: Here there is no proof either of any order by the district court or of any disobedience of any such order.

The court of appeals said (R. 234) that petitioner "admitted at his trial that he had disobeyed the order of the district court by refusing to answer before the grand jury the questions which the court had ordered him to answer * * *." No such admission appears in this record. Petitioner admitted only that he had refused to answer the questions set out in the presentment (R. 13a; cf. R. 14a, lines 3-4). He admitted nothing as to any order of the court; obviously the mere recitals in the presentment as to such an order are no more evidence against him than similar recitals in an indictment would be; and the record is devoid of any proof of any such orders.

Only two rulings by the court bearing on directions to answer appear in the record, and neither is shown to have been made in petitioner's presence (R. 219a, 146a; *supra*, p. 5). And there is a glaring variance between what actually occurred when sentence was pronounced, and what

is recited in the later judgment and commitment concerning those occurrences:

Record (R. 65a)	Judgment and Commitment (R. 201a)
[November 8, 1950]	[November 10, 1950]
The Court: • • • I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't, I am ready to impose sentence. Do you want to answer?	• • • that on the 8th day of November in the year 1950 this Court gave the said witness, Irving Greenberg, another opportunity to answer the said questions and he, through his counsel, stated in open court *that he would not obey the Order of the Court and answer the questions which the Court directed him to answer* as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice. [Italics added.]
Mr. Witkin: We take the same position we have taken before, may it please Your Honor. • • •	

In other words, while actually petitioner simply declined the proffered opportunity to purge himself of the contempt adjudged against him for refusal to answer questions before the Grand Jury, the recital in the subsequent judgment makes him appear to be "willfully, deliberately and contumaciously" disobeying and resisting a lawful order of the district court. And the court below affirmed the judgment of conviction on the latter footing.

Obviously, therefore, petitioner here stands convicted of something which he is not shown to have done. The rulings in his absence (R. 219a, 146a) do not amount to direct orders disobedience of which entails the penalties of contempt of court. *Berry* v. *Midtown Service Corporation*, 104 F. 2d 107 (C. C. A. 2).[10] There simply is no proof here of any order, hence there can be none of disobedience of any order.

[10] To the extent to which the rule of the cited case should be questioned at this juncture, it most assuredly creates a conflict between circuits.

This failure of proof, it may fairly be remarked, is a consequence of the fact that whereas the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401 (1), the gravamen of the formal judgment and commitment and of its affirmance on appeal was his violation of 18 U. S. C. 401(3). This circumstance would accordingly in any event involve a deprivation of due process of law, see *Cole* v. *Arkansas*, 333 U. S. 196, though the principle of the *Cole* case was early established: "The rule that a man shall not be charged with one crime and convicted of another" was long ago applied by this Court, in Chief Justice Marshall's time. *Schooner Hoppet* v. *United States*, 7 Cranch 389, 394.

3. We come now to the most serious aspect of this case, the circumstance that petitioner was prosecuted while being denied opportunity to present evidence in his defense. This question arises under both charges of the presentment.

a. Obstruction of justice, 18 U. S. C. 401(1). To the extent that the questions asked did not on their face appear to call for answers which would tend to incriminate petitioner, it was incumbent upon him to establish their incriminating character (*United States* v. *Rosen*, 174 F. 2d 187, 188 (C. A. 2), certiorari denied, 338 U. S. 851, and cases there cited), and the district judge therefore properly ruled that the burden shifted to the petitioner once his refusal to answer had been established (R. 14a).

To meet this burden, petitioner sought to show that he had been placed in fear of incrimination by newspaper reports of the prosecutor's announced plan to strike indirectly at numbers activities, which do not involve federal offenses, through the federal revenue and conspiracy laws (R. 196a-197a), and, by subpoenaing the prosecutor and his papers and by examining the Grand Jury minutes, to show that the answers to the questions asked petitioner before the Grand Jury would supply the links in a chain of

evidence which would show his commission of federal offenses (R. 45a-54a). Except for the newspapers, which were admitted for a limited purpose (R. 56a), petitioner was not permitted to make this showing (R. 35a, 53a-54a; *supra*, pp. 9-10).

This, we submit, was clearly error: It amounted to prosecuting petitioner while simultaneously denying him the right to defend. The reasoning of the court below, sanctioning this course, is, we submit with deference, impossible to follow.[11] But, in any event, the ruling of the court below is squarely in conflict with that of the Second Circuit in *United States* v. *Zweillman*, 108 F. 2d 802, where a conviction had in identical circumstances was reversed. Judge A. N. Hand there said (108 F. 2d at 803-804):

> It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecu-

[11] R. 236-237: "It is not necessary, of course, for the witness to prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it. Accordingly he need not prove that the government has in its possession or that the grand jury has secured from him or from other witnesses evidence which, when the answer to the question under attack is added, will be sufficient to complete the chain of evidence needed to convict him of federal crime. Here, as we shall see, the court was justified in concluding that a direct answer could not reasonably form a link in that chain. Accordingly the court did not err in refusing appellant access to the grand jury minutes and to the files of the government.* Where, as here, the question was innocent on its face all that the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them."

* [Footnote in original] "We, of course, do not decide whether these contentions of the appellant would have been meritorious in connection with the charge contained in the presentment that he had contumaciously obstructed the administration of justice by blocking the inquiry being made by the grand jury, since the district court did not, as we have pointed out, convict him on this charge. That question may well involve other considerations."

tion of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense.[12]

b. *Disobedience of court's order, 18 U. S. C. 401(3).* The same result would follow if it were assumed that, at the hearings prior to the presentment, petitioner had been squarely ordered by the court to answer the questions involved. At this juncture also, petitioner called for the prosecutor's files and the minutes of the Grand Jury to show the incriminating character of the questions asked him (R. 99a-100a, 148a). The district judge's ruling that (R. 150a) "that motion for the production of the documentary evidence * * * will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate", and again (R. 151a), that "Until you make some showing you will not see those records," put the cart before the horse with a vengeance: It denied petitioner an opportunity to prove the incriminatory nature of the questions asked until he had first proved their incriminatory nature. Otherwise stated, the judge denied petitioner access to the evidence which he required to de-

[12] See also, for the principle that, when the United States institutes criminal proceedings in which evidence otherwise privileged becomes importantly relevant, it abandons the privilege: *United States* v. *Andolschek*, 142 F. 2d 503; *United States* v. *Beekman*, 155 F. 2d 580; *United States* v. *Grayson*, 166 F. 2d 863 (all C. C. A. 2). Wholly different considerations, of course, are involved when the privilege attaching to papers of the United States is asserted collaterally. Cf. *United States ex rel. Touhy* v. *Ragen*, No. 88, decided February 26, 1951.

fend himself until he had first established his defense without that indispensable evidence.

The considerations under this heading are identical with those under the other: If petitioner was required to answer the questions by reason of 18 U. S. C. 401(1), he was required to obey the judge's order to answer them, under pain of 18 U. S. C. 401(3). By the same token, if he had a constitutional right to refuse to answer the questions before the Grand Jury, then the judge's order telling him to answer them was not lawful. In either event, petitioner could not properly be convicted when he was deprived of evidence which would show both that his refusal to answer was proper and that the judge's order that he answer was improper.

4. In addition to the foregoing, the present case raises a further important question of federal law to which widely divergent answers have been given by the several circuits, viz., the scope of the privilege against self-incrimination.

a. One phase of that problem turns on petitioner's refusal to state what his business was, in connection with the questions (1) *Are you in the numbers business now?;* and, after he had answered that he did not use his telephone for any lawful business, (3) *Do you use it for any other business?* and (4) *What business do you use it for?*

The court below conceded (R. 236), as it was bound to do, "that some possible answers to a question as to a witness' business may be incriminating under the federal law," though it quoted from its prior opinion in *United States* v. *Hoffman*, 185 F. 2d 617, 621, pending on certiorari, No. 513, this Term, to the effect that such a query "is so frequently asked of witnesses as a mere identifying question" that it is usually too innocent to be incriminatory. But this approach, by anticipating the answer, begs the question; whether or not the answer to an inquiry concerning a witness' business would in fact tend to incriminate him necessarily turns on the nature of that business.

Here, petitioner showed that he had not filed any social security or withholding tax returns (R. 37a). He showed that such returns would have been required as a matter of federal law, if while engaged in a business unlawful under state law, he had any employees in such business (R. 19a-26a). He showed that the nature of the numbers business was such that it required employees (R. 25a-26a). And he showed that the prosecutor had announced in the public press an intention to strike at "numbers, slot machines and other rackets * * * through the Federal revenue and conspiracy laws" (R. 196a) "even though there are no Federal laws regarding numbers" (*ibid.*), and that his own fear of self-incrimination was based in part on what he had read in the newspapers (R. 56a, 132a, 176a).[13]

In those circumstances, we submit, he had shown enough to indicate that he was in danger without going on to testify that in fact he himself had employees in his ventures, or that he himself was in the numbers business. The answers to such questions were the critical links in the chain; affirmative answers would have been admissions of guilt.

---

[13] There is also a great divergence among the courts of appeal as to the propriety of looking to newspaper reports in such circumstances, The Second Circuit has approved the practice. *United States* v. *Weisman*, 111 F. 2d 260, 262. The court below recently held that newspaper articles are competent "to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy"—provided they are introduced at the trial. *United States* v. *Hoffman*, 185 F. 2d 617, 621, pending on certiorari, No. 513, this Term. But in the Ninth Circuit, only a minority of the Court of Appeals subscribes to these views. *Alexander* v. *United States*, 181 F. 2d 480, 484, 488; *Kasinowitz* v. *United States*, 181 F. 2d 632, 633, 635, certiorari denied, 340 U. S. 920.

In the present case the court below reaffirmed its ruling as to newspapers, made in *Hoffman*, but went on to say (R. 237) that here "appellant made no such showing." Apparently a newspaper reference to a witness as an underworld figure is sufficient in the view of the court below to establish a fear of possible self-incrimination (*Hoffman*), while a similar reference to the prosecutor's plan to strike indirectly at violators of state laws through the federal tax and conspiracy laws is insufficient (the present case).

In any event, petitioner had shown enough to be justified in believing that he was in a precarious position. Accordingly, we submit further, he was justified in refusing to answer the questions above-noted, which might lead to the discovery of evidence linking him with a violation of federal law or with a federal conspiracy. That, at any rate, has been the rationale of decisions in other circuits. *United States* v. *Rosen*, 174 F. 2d 187 (C. A. 2), certiorari denied 338 U. S. 851; *United States* v. *Cusson*, 132 F. 2d 413 (C. C. A. 2); *United States* v. *Weisman*, 111 F. 2d 260 (C. C. A. 2); *Kasinowitz* v. *United States*, 181 F. 2d 632 (C. A. 9), certiorari denied, 340 U. S. 920.

The holdings in the cases cited are diametrically opposed to the very much narrower scope accorded the privilege against self-incrimination by the Third Circuit. For, however much the court below may have paid lip-service to the principle that the witness need not actually (R. 236) "prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it," in fact, as the present case indicates, it refused "to take the question in its setting", or "to remember that the defendant had been the object of much more than casual interest by the prosecution," or to hold, in consequence, that "these things made it perilous for him to answer." *United States* v. *Weisman*, 111 F. 2d 260, 263 (C. C. A. 2), *supra*.[14]

b. Another phase of the scope of privilege against self-incrimination is involved in petitioner's refusal to name numbers writers of his acquaintance around his place of business (R. 5a-6a). The rejection by the court below of petitioner's claim of privilege in this respect runs counter to the recent decision of this Court in *Patricia Blau* v. *United States*, 340 U. S. 159 (whether witness knew names of officers of Communist Party), and is also in conflict with

[14] The reliance of the court below in the present proceeding (R. 236) on the Second Circuit's decision in *United States* v. *Weinberg*, 65 F. 2d 394, certiorari denied, 290 U. S. 675, is badly misplaced; the *Weinberg* case involved an immunity statute.

the decision of the Ninth Circuit in *Alexander* v. *United States*, 181 F. 2d 480, and with that of the Fifth Circuit in *Estes* v. *Potter*, 183 F. 2d 865, certiorari denied, 340 U. S. 920, in both of which a witness's refusal to answer questions similar to those asked Patricia Blau was upheld. Indeed, petitioner here has made a far stronger showing of possible incrimination under the Internal Revenue Code than *Blau* or *Alexander* or *Estes* did, by reason of the questions asked them, of their possible incrimination through connection with the conspiracy denounced by 18 U. S. C. 2385 [18 U. S. C. (1946 ed.) 10] and now before this Court in *Dennis* v. *United States*, No. 336, this Term. It is a significant reflection on the attitude of the court below that, although the *Patricia Blau* case was cited there by petitioner, the opinion below does not even attempt to distinguish that decision.

c. It should be added, simply to show that the points have not been overlooked, that there is no question here of any waiver, or of any attempt on petitioner's part to protect others than himself. Cf. *Rogers* v. *United States*, No. 20, decided February 26, 1951. Petitioner's claim of privilege was no afterthought, nor was it ever relaxed; he asserted privilege from the time he was first called before the Grand Jury on October 8 (R. 222-223, 73a-75a) through the time he stood on that privilege in the face of the judge's finding him guilty of contempt on November 8 (R. 65a). And petitioner's only fear was that he, and he alone, might be placed in peril of incrimination (R. 131a-132a, 174a-176a).

d. The contrariety of views in the several circuits, and the need for balancing the demand, on the one hand, that the privilege against self-incrimination be not too widely extended at the risk of thwarting proper inquiries,[15] against

[15] See the speech of Senator Kefauver criticizing a judgment of acquittal in such a case as being too broad. 97 Cong. Rec. 1191-1192, Feb. 8, 1951.

the countervailing demand that the Constitutional guaranty be so interpreted that no person shall, in fact, "be compelled in any criminal case to be a witness against himself," require review of this question also.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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MARCH 1951.

APPENDIX.

Constitutional Provision and Statutes and Regulations Involved.

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

2. Section 401 of Title 18, United States Code (1948 revision), provides:

> **§ 401. Power of court**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. Section 1430 of Title 26, United States Code, provides:

> **§ 1430. Other laws applicable**
>
> All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 [tax on pistols and revolvers; penalty in 26 U. S. C. 2707, *infra*, pp. 24-25] or section 1800 [tax on documents, etc.; penalties in 26 U. S. C. 1820-1823], and the provisions of section 3661 [enforcement of liability for taxes collected], shall, insofar as applicable and not inconsistent with the provisions of this subchapter [Employment Taxes; Employment by others than car-

riers], be applicable with respect to the taxes imposed by this subchapter.

4. Section 1622 of Title 26, United States Code, provides in pertinent part as follows:

§ 1622. Income tax collected at source

(a) **Requirement of withholding.** Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 15 per centum of the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * * *

5. Section 1627 of Title 26 United States Code, provides:

§ 1627. Other laws applicable

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 [Employment taxes; tax on employees] shall, insofar as applicable and not inconsistent with the provisions of this subchapter [Employment Taxes; Collection of income tax at source on wages], be applicable with respect to the tax under this subchapter.

6. Section 2707 of Title 26, United States Code, incorporated by reference in 26 U. S. C. 1430, *supra*, pp. 23-24, provides in pertinent part:

§ 2707. Penalties

* * * * *

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other

penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

7. The pertinent portions of 26 C. F. R. 402, Employment Taxes, provide:

402.601 Tax and Information Returns

Every employer shall make a tax and information return on Form SS-1a for the first quarter after December 31, 1939, within which wages are paid to his employee or employees, and for each subsequent quarter (whether or not wages are paid therein) until he files a final return as required by the provisions of Section 402.603. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form SS-1a. One original return shall be filed with the collector. For purposes of returns under the Act, the quarters shall each be three calendar months as follows: (1) from January 1 to March 31, both dates inclusive; (2) from April 1 to June 30, both dates inclusive; (3) from July 1 to September 30, both dates inclusive; and (4) from October 1 to December 31, both dates inclusive.

405.601 Return and Payment of Income Tax Withheld on Wages.

Except as provided in 405.602 every person required, under the provisions of section 1622, I. R. C. to deduct

and withhold the tax on wages shall make a return and pay such tax on or before the last day of the month following the close of each of the quarters ended March 31, June 30, September 30, and December 31. Such return is to be made of Form W-1, Return of Income Tax withheld on Wages, and must be filed with the collector of internal revenue for the district in which is located the principal place of business or office of the employer, or if he has no principal place of business or office, then in the district in which is located his legal residence. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form W-1. The return on Form 941 must be filed with the collector of Internal Revenue for the district in which is located the principal place of business of the employer. • • •

402.609—Records—(a) Records of Employer.

(1) Every employer liable for tax shall keep accurate records of all remuneration (Whether paid in cash or in a medium other than cash) paid to his employees after December 31, 1939. • • •

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 586

IRVING GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 232–239) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1951 (R. 239). The petition for a writ of certiorari was filed on March 2, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the formal judgment adjudging petitioner guilty of contempt varied from the

earlier oral pronouncement of the court, and, if so, whether the formal judgment is controlling as to the basis of the finding of contempt.

2. Whether there was an order by the District Court that petitioner answer the questions he had refused to answer before the grand jury and whether there was proof of his disobedience of such an order.

3. Whether the District Court erred in refusing petitioner access to the grand jury minutes and government files.

4. Whether petitioner, a witness before a grand jury investigating violations of federal statutes, could lawfully refuse, on the asserted ground that his answers would tend to incriminate him under the federal social security and withholding tax laws, to answer questions disclosing his business and the names of number writers whom he admitted he knew.

STATUTE INVOLVED

18 U. S. C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT

On September 14, 1950, a grand jury for the Eastern District of Pennsylvania "undertook an inquiry concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses" (R. 2). Petitioner was subpoenaed to appear as a witness before the grand jury on October 2, 1950, at which time he refused to answer certain questions, claiming that his answers might tend to incriminate him (R. 2). On October 9, the Government requested the District Court to instruct petitioner to answer the questions (R. 2, 222, 223), amended so that they referred only to the year 1950 (R. 203, 224, 227, 229), and a hearing, at which petitioner was present with counsel (R. 2, 223–224), was held upon his claim of privilege (R. 2, 71–99, 95–99, 198, 203–204, 222–224). On October 16, the court, after hearing further argument of counsel, found that there was no real and substantial danger that the answers to the questions would incriminate petitioner under a federal statute and ordered him to return before the grand jury and answer them (R. 2, 146, 198).

On October 17, petitioner was recalled as a witness before the grand jury and answered some of the questions but refused to answer others (R. 3, 198–199). Extensive hearings before the court on petitioner's claim of privilege, consisting primarily of argument by counsel, followed on October 17–20, 23, 30 and 31,[1] at which he was again represented by the same counsel.

On October 17, Mr. Goldschein, the government attorney in charge of the grand jury investigation, was supoenaed to produce all government records and grand jury minutes concerning the investigation of, or containing information about, petitioner; the demand was resisted by the Government (R. 100). After the submission of briefs and oral argument, during which *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 8),[2] was called to the court's attention (R. 104), the court, on October 19, deferred ruling on petitioner's subpoena, stating (R. 111):

> I am going to defer ruling on the motion to quash because I have no criterion. You have to make a showing. You can call Mr. Goldschein; you can call your witness then. This isn't a contempt proceeding.

---

[1] The complete transcript of these hearings is not included in the printed record. The parts included are at the following pages: October 17—99–102; 18—102–109; 19—109–112; 20—112–121, 204–218, 224–228; 23—121–145, 228–231; 30—218–221, 145–148; 31—149–156.

[2] Petitioner contends that this case is in conflict with the decision below. See *infra*, p. 24.

> You are laboring under a misapprehension. This isn't the contempt proceeding. I don't know, you may know, but I don't know whether he is going to be held for contempt at all. I don't know at this stage. There may be a showing that he is in reasonable apprehension, and until you make that showing I have no criterion to say whether or not you have any right or I have any right to request the Attorney General to produce the records.

On October 23, petitioner testified that he refused to answer the questions because the answers would incriminate him under the internal revenue laws; that he stated in his 1949 income tax return that he was engaged in a certain business[*] and listed other income under "Miscellaneous"; and that his apprehension that his answers to the questions would tend to incriminate him was based on what he had read in the newspapers, his counsel's advice, and his own knowledge of what his answers would be (R. 130–132). Petitioner's counsel testified that, based upon information given him by petitioner and his own knowledge of the law, it was his opinion that the answers would incriminate petitioner (R. 143).

On October 30, petitioner appeared with counsel before the court and, following certain proceedings, the court "again found that there was no

[*] This referred to his real estate business and not the business to which the questions were directed.

real and substantial danger of incrimination for the violation of a Federal statute * * * and ordered him to return before the Grand Jury and answer" the questions which he had refused to answer (R. 199; see also R. 4, 146, 219–220). Later that day petitioner was recalled before the grand jury, where he again refused to answer the questions (R. 6–8, 10–14, 199–201).

On the same day, October 30, after the court had ordered petitioner to answer the questions before the grand jury, the following colloquy concerning petitioner's subpoena for government files and grand jury minutes occurred (R. 147):

> Mr. GOLDSCHEIN. There is a motion to quash the subpena duces tecum, and the Court took that under advisement pending a showing by the defense, whether or not you will quash that subpena duces tecum, or have me produce for the Court—
>
> The COURT. Yes. Aren't you going to offer some——
>
> Mr. KOSSMAN. If the Court please, the motion on the subpena duces tecum * * * Now, if the Court pleases. I suggest that the issue in that particular motion—and the defendant is not trying to get the Court to do anything but simply decide that particular motion before the contempt proceeding—you thought it was premature, but now we are one day before, let us say, the contempt proceeding, or two. So it is not too premature.

After argument by petitioner's counsel, in which he quoted from the *Zwillman* case, *supra*, p. 4 (R. 148), the court on the next day, October 31, again ruled as follows (R. 150–151):

> The COURT. All right. Now, I say to you with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate.
>
> Mr. KOSHMAN. Your Honor——
>
> The COURT. Now let me finish. You will put this man on the stand, Greenberg, if you want to, if you see fit. I am not going to give his books and records—I take it they are here available.
>
> Mr. GOLDSCHEIN. Yes, sir, they are available.
>
> The COURT. They are here available for this Court first to inspect. I say to you that you will not have any opportunity to look at that record. We will not divulge Grand Jury proceedings to you or to any other counsel or anybody else. When and as you make some showing that this defendant, that this witness is in reasonable danger of incriminating himself to the satisfaction of this Court, I will then decide whether or not this is the fact, or if there is some showing that he reasonably might be put in danger, then I will decide whether or not they may be inspected, but until that showing has been made, you will

not see any Grand Jury proceedings. I may or may not be wrong, but we will have that ruling.

* * * * *

The Court. Until you make some showing you will not see those records. You might as well satisfy yourself about that. I can be wrong.

On November 1, the grand jury filed a presentment with the court (R. 2–9) which, as later amended (R. 170–180), charged, *inter alia*, that petitioner had been ordered by the court on October 30 to answer before the grand jury, and later that day had refused to answer, the following questions: (1) "Are you in the numbers business now"; (2) "Did you during the past year (1950) operate a bookmaking establishment"; after testifying that he knew numbers writers, men in the numbers business, around 1133 West Diamond Street, he was asked, (3) "Who"; after testifying that he made regular calls from the telephone at 1133 West Diamond Street during 1950, and that he did not use it for any lawful business and that he did not use it in his real-estate business, he was asked, (4) "Do you use it for any other business," and (5) "What business do you use it for" (R. 3–8, 170–180). The presentment further charged that petitioner, by refusing to answer the questions, had (1) "willfully, deliberately and contumaciously shut off and blocked the search for truth, thwarted the investigation of this

Grand Jury in the matter hereinbefore set out, and obstructed the administration of justice," and (2) had "willfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court by willfully and deliberately refusing to obey the Order of this Court to answer before the Grand Jury the aforesaid questions" (R. 8).

On November 1, petitioner again renewed his request for the grand jury minutes and the government files, which the court again rejected, saying (R. 190):

> I told you, and now again, that I will on a proper showing—the books and records are available to this Court, they are here, and if you don't like that ruling you take an appeal. There is no use, continued reiteration isn't going to be any more persuasive on my ruling.

At petitioner's trial for contempt on November 3, he was brought to the bar of the court and there answered the second question ("Did you during the past year (1950) operate a bookmaking establishment") and admitted that he had refused to answer the other questions listed in the presentment (R. 10–14). Petitioner then elected to proceed with the contempt trial (R. 14). At the trial petitioner introduced as evidence certain pages of the transcript of the earlier hearings (R. 14–15, 71–195), and he adduced the testimony of a certified public accountant who was a

tax expert to the effect that if petitioner during 1950 was engaged in an unlawful business or in the numbers business and had employees in such business who were not exempt, he would have been obligated under the internal revenue laws and the Federal Insurance Contributions Act to have made withholding deductions from the employees' wages and to have made quarterly returns of such deductions to the Collector of Internal Revenue (R. 18–30). Petitioner testified that he had not filed any withholding tax returns during 1950 (R. 37), and he introduced a statement he had made before the grand jury that "in the number business there are bankers" and "people who work for the bankers; who, among other duties, compute the records as turned in by the pickup men and the number writers" (R. 25–26).

Petitioner called Mr. Goldschein as a witness and offered to prove that petitioner answered all, except those numbered (1), (3), (4), and (5) above, of hundreds of questions asked him before the grand jury; that petitioner was being investigated by the Government and before the grand jury; that other witnesses before the grand jury had been asked questions concerning petitioner; that the answers to these four questions were known by the Government; that the Government already had information "which would definitely establish the unlawful business" of petitioner;

that Mr. Goldschein had made statements to the press as reported in newspaper articles (later introduced in evidence) and that there was a definite plan on the part of the Government to show that petitioner had violated the Federal income tax laws (R. 48–53). Objection to this offer of proof was made and sustained, as follows (R. 52–53):

> Mr. O'Keefe. If the Court please I think we can boil these points that he has down to about three. First, he wants Mr. Goldschein to reveal to him and in open court the transactions of the Grand Jury, which is not permissible, as Your Honor knows. He wants to show by his second point that the motion that Your Honor has under consideration now, namely, that he produce his records, he wants to show by that whether or not he has a case or can present a case before the Grand Jury for violation of a Federal statute, what the evidence is that he has, and thirdly on that point he is making or will attempt to make Mr. Goldschein show all the evidence that the Government has, if they do have any, and we certainly don't admit one way or the other that they have sufficient evidence to put before the Grand Jury to make a case on this man.
>
> * * * * *
>
> The Court. All right, the objection is sustained. The Court so holds as to each and every one of the offers seriatim. The

motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made.

The newspaper articles referred to in the offer of proof were admitted in evidence (Def. Ex. I, R. 56, 196–197); they attributed to Mr. Goldschein and government "spokesmen" statements, *inter alia*, that the Government intended "to strike indirectly at racketeers" "through the Federal revenue and conspiracy laws."

At the conclusion of the trial, the court reserved decision (R. 64). On November 8, petitioner was called to the bar of the court and it "adjudge[d]" him "in contempt of court," but informed him that the court was "now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer," to which petitioner's counsel replied, "We take the same position we have taken before" (R. 65). After a plea by petitioner's counsel for leniency, the court sentenced petitioner to five months' imprisonment and admitted him to bail pending appeal (R. 71). A notice of appeal was filed the same day (R. 1). On November 10, the court entered its formal judgment (R. 198–201) adjudging petitioner "guilty of a contempt of this Court by a forcible resistance to a lawful Order thereof," i. e., in refusing to answer the questions, "Who," "Do you use it for any other business," and "what business do you use it for," listed above.

The Court of Appeals affirmed the conviction (R. 232–239), holding, *inter alia*, that "the district court based the finding of contempt solely upon the appellant's refusal to answer" the three questions mentioned in the formal judgment (R. 234).

ARGUMENT

1. Petitioner contends that the formal judgment varied from the judgment pronounced in court (the latter, he says, being "a general finding of guilty") in that it omitted to find him in contempt (1) for refusing to answer the question, "Are you in the numbers business now," and (2) for obstruction of justice (Pet. 12). Consequently, he argues, (a) that "to the extent that the [formal judgment] varie[d] from what is said in court, it is utterly void" (Pet. 12–13), and (b) that, "whereas the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401 (1) [obstruction of justice], the gravamen of the formal judgment and commitment and of its affirmance on appeal was his violation of 18 U. S. C. 401 (3) [disobedience of the court's order]," with the result that there was "a deprivation of due process" under the "rule that a man shall not be charged with one crime and convicted of another" (Pet. 15).

The presentment, as amended at the trial, charged petitioner with violating both subsections

(1) and (3) of 18 U. S. C. 401[4] in refusing to answer the three questions referred to in the formal judgment and also the question, "Are you in the numbers business now," and the trial proceeded on the understanding that he was being tried for refusing to answer these four questions (R. 10–14). *Prima facie*, the formal judgment rather than a statement in an opinion or a docket entry is the judgment of the court. *United States* v. *Hark*, 320 U. S. 531, 534–535. The controlling factor, however, is the intent of the judge at the time sentence is pronounced. *Wilson* v. *Bell*, 137 F. 2d 716, 720 (C. A. 6); *Watkins* v. *Merry*, 106 F. 2d 360, 361 (C. A. 10). Cf. *Miller* v. *Sanford*, 161 F. 2d 291 (C. A. 5),[5] certiorari denied,

[4] And we find nothing in the record to support petitioner's assertion that "the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401 (1)." Consequently, his contention that he was deprived of due process by being charged with one crime and convicted of another is wholly without factual basis.

[5] P. 292: "As to the contention that the docket entry made by the judge of the sentence in the Southern District of Texas overrides the sentence which he signed, it is true that at common law sentence was orally pronounced by the judge and taken down by the clerk in the minutes, which were later signed by the judge as a whole. The docket entry was only the memorandum of the judge, and not the record of the sentence. The practice in the federal courts was changed on May 24, 1937, by an amendment of Rule 1, Procedure in Criminal Cases after Verdict, to require: 'The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.' 301 U. S. page 717. Here the sentence as signed by the judge was the

332 U. S. 774. The oral statements of the District Court that petitioner was "adjudge[d]" "in contempt of court" (R. 65) and sentenced "for violation of criminal contempt" (R. 71) did not unequivocally indicate an intention to find him in contempt in all respects as charged in the presentment. The court did not state that petitioner was found guilty as charged. This ambiguity in the oral pronouncement of the court was, therefore, clearly resolved by its formal judgment.

But even if the oral pronouncement did find petitioner in contempt in every respect as charged in the presentment, the omission in the formal judgment of some of the specifications embodied in the oral pronouncement was not detrimental to him, but rather to his benefit, for such omissions constituted, in effect, a vacation of part of the judgment. A vacation of the judgment as to the charge of violation of 18 U. S. C. 401 (1) would not render the judgment void or give petitioner cause for complaint as to a violation of 18 U. S. C. 401 (3). Likewise, a vacation of the judgment of contempt of court for refusing to answer one question would not invalidate the judgment of contempt for refusing to answer the other questions. Cf. *Irving Blau* v. *United States*, 340 U. S. 332, 335 (dissenting opinion); *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1; *Hira-*

effective sentence. It is needless to enquire whether the docket entry does not mean the same thing, as appellee contends."

bayashi v. *United States*, 320 U. S. 81, 85. In respect of the question, "Are you in the numbers business now," we think it unimportant in any event whether the judgment was in part based upon petitioner's refusal to answer it, for it involves the same problems under the Fifth Amendment as the questions concerning the business in which petitioner used the telephone (see discussion, *infra*, pp. 26–30).

2. Petitioner further contends that there was "no proof either of any order by the district court or of any disobedience of any such order" (Pet. 13–15). On the contrary, the record does contain such proof. Petitioner had been brought before the court for the very purpose of securing an order compelling him to answer the questions and there were extensive hearings on the issue whether such an order should be granted. Petitioner was represented at these hearings by counsel who argued at great length that the answers to the questions would incriminate him. During the seventh day of these hearings, on October 30, immediately following an argument by petitioner's counsel on the alleged incriminating character of the question, "Who," the court said, "I don't see here where there is any direct tendency to incriminate him. It may involve number writers, but I won't bridge that gap. I am directing him to answer who they are." (R. 219.) To this petitioner's counsel excepted, indi-

cating that he understood it to be an order. Later that day the court suggested that, since all the "repeated refusals to answer concern itself with the basic question 'Are you in the numbers business'" and "since counsel [for petitioner] have chosen to make their stand" not to answer it, an appeal be taken only on that question (R. 145–146). But this suggestion was not acceptable to government counsel. Mr. Goldschein stated that he thought he might eventually get the answer (R. 145) and that his position was "simply this. At first [petitioner] refused to answer quite a string of questions. The Court compelled him to answer. Of course we can't anticipate which questions [if he is ordered to answer them] he will or which questions he won't", with which the court agreed, stating, "That is right" (R. 146). And later that day the court announced its order, stating, "I am going to rule[6] here, that these questions have to be answered * * *" (*ibid.*).[7] It is clear that petitioner's counsel understood this ruling to be an order that petitioner answer the questions before the grand jury, for following it there occurred a colloquy concerning the time when peti-

[6] The statute under which petitioner was convicted, 18 U. S. C. 401, *supra*, p. 2, provides for punishment for contempt of the court's authority in disobeying its lawful "writ, process, order, rule, decree, or command."

[7] This part of the record of the hearing of October 30 was admitted into the record of the contempt trial (R. 14–15).

tioner should again go before the grand jury (*ibid.*), and petitioner's counsel (while arguing for a ruling on his request for the grand jury minutes and Government files) said, "we are one day before, let us say, the contempt proceeding, or two * * *" (R. 147). There is no suggestion anywhere in the record that petitioner or his counsel did not fully understand that petitioner was ordered to answer the questions before the grand jury.[6]

Petitioner admitted at the trial that he had refused to answer before the grand jury the questions set forth in the presentment (R. 10–14), which were the ones that he had been ordered to answer, and, accordingly, that he had disobeyed that order. Furthermore, when the court offered

[6] In this connection, petitioner also contends that the order of the court was defective in that the record does not show that it was made in petitioner's presence (Pet. 13–14). We think, on the contrary, that it does so show, for the court stated in its judgment that on October 30 (the day on which the order was made) petitioner "appeared with his counsel before the Court" and that, following certain proceedings, it "ordered him to return before the Grand Jury and answer" the questions (R. 199). There is no indication in the record that petitioner was not present at that time. But even if he was not, his counsel was there in his behalf (R. 146, 219) and this was sufficient. Cf. *United States* v. *Shipp*, 203 U. S. 563. Indeed, those to whom orders are directed by an appellate court, as in the *Shipp* case, are seldom present. *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107 (C. A. 2), relied on by petitioner, did not hold that a person adjudged in contempt of court for disobedience of its order must have been present when that order was made, but instead that the District Court there made no order at all.

him an opportunity to purge himself by answering the questions, his counsel stated, "We take the same position we have taken before" (R. 65), thereby indicating that petitioner would continue to refuse to answer them and, accordingly, to refuse "to obey the Order of this Court," as the judgment recited (R. 201).

3. Petitioner also maintains that the District Court erred in refusing him access to the grand jury minutes and Government files concerning the grand jury's investigation (Pet. 15–18). In order to determine whether this action of the District Court was proper it is necessary to examine its rulings with regard to those minutes and files.*

After *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2), had been called to the court's attention both in oral argument and briefs, the court, on October 19, deferred ruling on the question whether it would force the Government to expose its files and the grand jury minutes until petitioner had made a showing that he was "in reasonable apprehension," which would give the court some "criterion" on which to decide whether it had "any right to request the Attorney General to produce the records" (*supra*, pp. 4–5). On October 30, when the matter was again called to the court's attention, it asked petitioner's coun-

* The Court of Appeals said (R. 236–237): "the court did not err in refusing appellant access to the grand jury minutes and to the files of the government."

sel if he was going to offer some showing (*supra*, p. 6). And on the next day, October 31, no showing having been made,[20] the court said, "Now, I say to you with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate. * * * You will put this man on the stand, Greenberg, if you want to, if you see fit. * * *. We will not divulge Grand Jury proceedings to you or to any other counsel or anybody else. When and as you make some showing that this defendant, that this witness is in reasonable danger of incriminating himself to the satisfaction of this Court, I will then decide whether or not this is the fact, or if there is some showing that he reasonably might be put in danger, then I will decide whether or not they may be inspected, but until that showing has been made, you will not see any Grand Jury proceedings. * * * Until you make some showing you will

[20] At this point, the only evidence petitioner had offered was a statement by himself that he believed the answers would incriminate him under the federal revenue laws and a like statement by his counsel (*supra*, p. 5). At his contempt trial, on November 8, petitioner further testified that he had not filed social security and withholding tax returns during 1950, and he introduced newspaper articles indicating that the Government intended "to strike indirectly at racketeers" "through the Federal revenue and conspiracy laws" and a statement by himself that bankers in the number business had employees (*supra*, pp. 9–10, 12).

not see those records" (*supra*, pp. 7–8). When petitioner's counsel again renewed this request, on November 1, the court repeated its earlier ruling, stating, "I told you, and now again, that I will on a proper showing * * *" (*supra*, p. 9). And at the contempt trial, on November 3, the court said, "The motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made" (*supra*, pp. 11–12).

Subsection (c) of Rule 6, F. R. Crim. P., provides that "the record [of a grand jury] shall not be made public except on order of the court," and subsection (e) provides that "a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connnection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment[11] because of matters occurring before the grand jury." The Advisory Committee said, in connection with this Rule (Preliminary Draft, F. R. Crim. P., p. 25), that "The traditional practice has been to keep secret the proceedings of the grand jury." See also *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234; *Goodman*

[11] Petitioner's counsel contended that the presentment was "in the nature of an indictment" (R. 163, 192–194).

v. *United States*, 106 F. 2d 516, 519 (C. A. 9);" *Metzler* v. *United States*, 64 F. 2d 203, 206 (C. A. 9)." The reasons for this requirement are summarized in *United States* v. *Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D. Md.):

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The Advisory Committee also commented that (p. 26) "The necessity for disclosure of grand jury proceedings is left to the discretion of the

[12] P. 519: "Further, the evidence taken before grand juries is confidential matter, to which the accused person has no right of access."

[13] P. 206: "The transcript of the whole of the grand jury proceeding in the hands of the prosecuting attorney was a confidential matter to which the defendants had no right."

judge in those situations where disclosure is permitted by the terms of the rule." See also *United States* v. *Socony-Vacuum Oil Co.*, *supra*, at pp. 233-237; *Schmidt* v. *United States*, 115 F. 2d 394 (C. A. 6);[24] *Metzler* v. *United States*, *supra*.

Accordingly, the District Court was justified in requiring that petitioner make "some showing that he reasonably might be put in danger" by answering the questions before it would "divulge Grand Jury proceedings," for such action might have seriously hampered, if not totally destroyed, effectiveness of the grand jury's investigation. Certainly a witness cannot, after refusing to answer innocent questions before a grand jury, demand the disclosure of the entire grand jury proceedings and the Government files in connection therewith, or in the alternative, relief from a charge of contempt.[25] And we think as did the district judge, that the scant evidence (see fn. 10, *supra*, p. 20) petitioner adduced did not show any necessity for such disclosure. Even though

[24] P. 397: "Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court * * *. It is a matter which appeals to the discretion of the court when brought to its attention. This has long been the practice and we think it is sound procedural law."

[25] This is not a case where the functions of the grand jury had been completed and there no longer existed any reason for keeping its record secret, as in *Atwell* v. *United States*, 162 Fed. 97 (C. A. 4).

petitioner had not filed social security or withholding tax returns, he introduced no evidence to indicate that he might have been obligated to do so. Nor was there any evidence that he was connected with the "rackets" under investigation, or that he had a prior criminal record, or was reputed to be a law violator. Furthermore, he did not show what incriminatory circumstances might be disclosed in the grand jury minutes or Government files which he could not present by his own witnesses.

But regardless of what was shown by petitioner's evidence, the "necessity for disclosure of grand jury proceedings is left to the discretion of the [trial] judge" (*supra*, pp. 22–23). It cannot be said that the trial judge abused his discretion in deciding that petitioner had not shown that necessity.

Nor is the decision below in conflict with the *Zwillman* decision, *supra*, as petitioner contends (Pet. 16). The ruling of the District Court in that case "that only the questions [which the defendant had refused to answer] themselves were material in a proceeding to punish for contempt" (108 F. 2d at 804) is in striking contrast to the rulings of the District Court below. As we have shown, it repeatedly indicated that petitioner could introduce other evidence to show the necessity for disclosing the grand jury minutes and Government files and it afforded him full op-

portunity to show by his own evidence that the answers to the questions would tend to incriminate him." In the *Zwillman* case, on the other hand, the court, on the objection of the Government, excluded all evidence offered by the defendant, including the grand jury proceedings (108 F. 2d at 803), and "he was warned by the court that nothing was relevant on the presentment for contempt except the questions which he had refused to answer" (*id.*, at 804). We think that in the part of the *Zwillman* opinion upon which petitioner relies (Pet. 16–17)[11] the court was referring to the entire conduct of the Government in securing the exclusion of all evidence offered by the defendant, rather than only

[10] See R. 185: Mr. Wyzkin. * * * In other words, I don't think either Mr. Goldschein, and I know Your Honor wouldn't presuppose to tell us what evidence we ought to present.

The Court. I certainly would not.

[11] 108 F. 2d at 803–804:

"It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby, deprived him of his right to a proper trial where he could offer evidence in his defense."

the grand jury proceedings. Certainly that language must be read in the light of the facts of the case. The court's conclusion that the Government "could not put [the defendant] in contempt" was limited to the situation before the court, i. e., where the Government "chose to * * * confine the defendant's defense only to showing that the questions asked were incriminatory on their face * * *." Since the exclusion of grand jury proceedings could not alone have that effect, the decision does not support petitioner's contention that he was entitled to see the proceedings in preparing his defense."

4. Petitioner does not attempt to support his claim of privilege on the ground that the numbers business was illegal under state law. Such a claim would not be valid, since this Court has definitely determined that the privilege provided by the Fifth Amendment relates only to incrimination with respect to federal offenses. *United States* v. *Murdock*, 284 U. S. 141, 148; *United States* v.

"The rule of the Second Circuit that "when the United States institutes criminal proceedings in which evidence otherwise privileged becomes importantly relevant, it abandons the privilege," referred to by petitioner (Pet. 17, fn. 12), does not apply here. That rule is limited to "documents relevant to [defendant's] defence, which are in the possession of a department of the Government, whose regulations make them unavailable at the trial" or condition their disclosure "upon the consent of such a department." *United States* v. *Grayson*, 166 F. 2d 863, 870. Under Rule 6, F. R. Crim. P., *supra*, p. 21, only the court can authorize the divulgence of grand jury proceedings.

Murdock, 290 U. S. 389, 396; *Feldman* v. *United States*, 322 U. S. 487.

Nor does petitioner assert that the answers to the questions might incriminate him because his business was illegal under federal law. He argues instead that the answers to the questions might have incriminated him under the federal social security and withholding tax laws because "he had not filed any social security or withholding tax returns" during 1950 (Pet. 18–22). As the court below said, "What we have to decide is merely whether a witness may decline to state his business, although it is not unlawful under federal law, upon the theory that he may have violated some federal law in the course of the conduct of that business," and whether he may decline to disclose the names of number writers whom he admitted that he knew without indicating how such disclosure "could form a link in a chain of evidence which would convict him of the violation of any of the federal statutes to which he refers" (R. 238–239).

The constitutional protection against self-incrimination "is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." *Heike* v. *United States*, 227 U. S. 131, 144. The duty of determining whether the danger is real or fanciful is primarily for the trial judge, as this Court decided in *Mason*

v. *United States*, 244 U. S. 362, where it stated at page 366:

> The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

The court below held that petitioner had not made a showing of such circumstances as to indicate that the answer would put him in any real danger as to the withholding of taxes from employees. This conclusion seems to be entirely warranted on the facts. The numbers business has no closer relationship to withholding taxes than any other business. So far as this case is concerned, the answers would have had the same effect if the witness had been asked whether he was running an automobile agency or selling dry goods. The mere fact he was in a particular kind of business is not close enough to the offense of failure to withhold employee taxes to make the answer to the question incriminating. The fact

that the witness had been in business could be relevant only to the extent that the Government might deduce that he had had employees. But if the Government chose to prosecute on the tax violations, if any existed, the incriminating fact would be that the witness did have employees, and it is difficult to perceive how testimony as to the kind of business he was in would provide a link in establishing that fact. The same is true with respect to the names of the numbers writers whom the witness admitted knowing but refused to identify. No claim was asserted that the witness had any business connection with these persons, that they were his employees, or that they might serve as sources of information which would aid in his prosecution for any federal offense. They were not, as in the *Blau case* (*Blau v. United States*, 340 U. S. 159), suggested to be associated with him in a common enterprise. Conceivably, if the Government sought them out and questioned them, they might provide leads to involve the witness in the numbers racket. But since the only federal crime suggested was failing to file withholding tax returns, the names of these persons were even more remote from a federal violation than the direct question as to his own participation in the business.

In any event, whether or not failure to pay withholding taxes is closely or remotely connected

to a question as to the nature of one's business is an issue limited to the facts of this particular case. An issue of this sort does not present an appropriate question for consideration by this Court on certiorari.

Although the questions asked the witness in this case as to the nature of the business are similar to the questions in *Hoffman* v. *United States*, No. 513, certiorari granted, March 12, 1951, the legal issues are different. In the *Hoffman* case, the issue was whether the witness was required to go forward and make some showing how a question as to his business could be incriminating; the claim was that the answer itself might incriminate, since the business might be illegal under federal law (e. g. counterfeiting). Here the witness went forward, but the showing negatived any claim that the business itself was unlawful under federal law, and revealed that the alleged incrimination was through a tenuous link to the withholding of employee taxes. The issue in the *Hoffman* case as to how a witness can disclose such circumstances as to enable the judge to pass on his claim without thereby automatically incriminating himself is not the same as the issue whether, when circumstances are disclosed showing a business not illegal under federal law, the relationship of the question to a different offense is sufficiently close.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 586. GREENBERG *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for reconsideration in the light of *Hoffman* v. *United States, ante*, p. 479. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioner. *Solicitor General Perlman, As-*

sistant Attorney General McInerney, John F. Davis and *Robert S. Erdahl* for the United States. Reported below: 187 F. 2d 35.